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Supreme Court of the United States

October Term 1974

No. 74-5435

PAUL KERN IMBLER,
Petitioner,

v.

RICHARD PACHTMAN, District Attorney,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PACHTMAN

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IN THE

Supreme Court of the United States

October Term 1974

No. 74-5435

PAUL KERN IMBLER, *Petitioner*,

v.

RICHARD PACHTMAN, District Attorney, *Respondent.*

BRIEF FOR RESPONDENT PACHTMAN

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Central District of California of June 30, 1972 (Civ. No. 71-123-RJK) dismissing Mr. Imbler's action as to Mr. Pachtman, is found in the Appendix, pages 104 to 113, inclusive.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment is reported at 500 F.2d 1301 (1974) and is found in the Appendix at pages 116 to 125, inclusive.

JURISDICTION

This action was filed in the United States District Court for the Central District of California on January 15, 1971, (A. 2), asserting claims under 42 U.S.C. Sections 1983 and 1985 and implicitly invoking federal jurisdiction under 28 U.S.C. Section 1343. (A. 61-81). The district court dismissed the action as to respondent Pachtman on June 30, 1972. (A. 7, 113). Petitioner Imbler filed a timely notice of appeal on July 7, 1972. (A. 7, 114). The Court of Appeals entered its judgment affirming the district court on July 12, 1972. (A. 116). A petition for rehearing was filed and was denied on September 10, 1974. (A. 126). Mr. Imbler filed his petition with this court for a writ of certiorari on October 17, 1974, alleging grounds specified in Rule 19(b), including a conflict among decisions of various circuits of the Court of Appeals. This Court granted certiorari on February 24, 1975, (A. 127), exercising its jurisdiction under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983,[1] which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[1] In his jurisdictional statement, petitioner relies solely on 42 U.S.C. §1983 [Brief of Petitioner, p. 11], although he presents a cluster of statutes on pages 12-19 of his brief, of which Section 1985 might be relevant and which is set out in full at pages 16 to 18 of Petitioner's Brief.

QUESTION PRESENTED

Is a state prosecutor absolutely immune, on the basis of quasi-judicial immunity, in a suit for damages under the Civil Rights Act, especially 42 U.S.C. Section 1983, for actions performed by him within his prosecutorial function in the questioning and production of witnesses during a state criminal proceeding?

It is submitted that the ten issues posed by Petitioner [Brief of Petitioner, pages 19-22] are encompassed by this single question.

STATEMENT OF CASE

On January 4, 1961, two men entered a Los Angeles market tended by Mr. Hasson and his wife. One of the men shot and fatally wounded Mr. Hasson. The men then left the store and departed in different directions. Mr. Costello, a passerby, heard the shot, saw a man with a gun leave the market, followed him, saw him discard his coat, and recovered the gunman's coat. A pistol, later identified as the murder weapon, and other items, were found in the coat. [A. 8-9, 14-15, 32-33.]

Ten days later, three men attempted to rob a Po-

mona gas station. While escaping from the scene of the robbery, their vehicle overturned and one accomplice, Leonard Lingo, was killed. Two days later Mr. Imbler surrendered to the police on the robbery charge. [A. 15, 34]. Suspecting a link with the January 4th murder, the police showed Mrs. Hasson a photograph of Mr. Lingo, whom she identified as the accomplice of the gunman who murdered her husband. She could not identify the gunman. [A. 15, 32, 34].

Mr. Costello identified Mr. Imbler as the gunman. Two other eyewitnesses identified Mr. Imbler as the gunman or placed him at the scene of the murder. [A. 15, 33, 34.] All attempts to tie the physical evidence to Mr. Imbler were fruitless. [A. 15.]

Mr. Imbler was tried before a jury and was convicted of murder in the Superior Court of the State of California for the County of Los Angeles in July of 1961. [A. 8, 104]. Richard Pachtman was the deputy district attorney of the County of Los Angeles who prosecuted Mr. Imbler on behalf of the People of the State of California [A. 105.]

Mr. Imbler was sentenced to death. [A. 8, 14, 104.] The conviction was affirmed by the California Supreme Court on May 17, 1962. *People* v. *Imbler* (1962) 57 Cal.2d 711, 371 P.2d 304, (A. 8). On June 29, 1962, Mr. Imbler was ordered to be executed on September 12, 1962. *People* v. *Imbler*, No. 240368, *Minutes of June 29, 1962.*

Thereafter, Mr. Pachtman, upon information from Adult Authority investigators and with their further help, gathered [A. 28] and transmitted to the Governor's clemency review board certain information[2] (Appendix A) which tended to support petitioner's alibi. [A. 28, 35].

Mr. Imbler then sought habeas corpus relief in the California courts, to a major extent on the basis of the information transmitted to the Governor by Mr. Pachtman. Amicus and later counsel for petitioner,[3] Gregory S. Stout, in his brief filed with the California Supreme Court in *In re Imbler* (1963) 60 Cal.2d 554 on October 26, 1962, described Mr. Pachtman's actions in further investigating the case and in reporting the information to the Governor as follows:

> "In the highest tradition of law enforcement and justice, there is no greater example of devotion to duty that has come to my attention than the conduct of Richard Pachtman, the trial deputy District Attorney and the investigators from the Adult Authority. . ." (Amicus Brief submitted by Gregory S. Stout, pages 24-25.)[4]

The California Supreme Court appointed Justice White, recently retired from that court, as a referee

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[2]See Mr. Pachtman's letter of August 17, 1962 to Governor Brown, attached hereto and incorporated herein as Appendix A, of which we ask this Court to take judicial notice as an official document and as an item discussed in the Reporter's Transcript of the Reference Hearing, Vol. II, pp. 467-477, in the case of *In re Imbler* (1963) 60 Cal.2d 554.

[3]Mr. Stout was counsel for Mr. Imbler on the original appeal (A.8) as well as on the state habeas corpus proceeding (A. 14).

[4]We request the Court to take judicial notice of this brief as part of the files *In re Imbler* (1963) 60 Cal.2d 554.

to take evidence concerning whether any witness who had testified against Mr. Imbler had committed perjury, and whether any representative of the State had knowingly caused or suffered any such perjury to be introduced at Mr. Imbler's trial, or had suppressed evidence favorable to Mr. Imbler. *In re Imbler* (1963) 60 Cal.2d 544; (A. 16). One of the four prosecution witnesses, Mr. Costello, whom Mr. Imbler's counsel describes as a "bum" [Brief of Petitioner at 52], recanted his trial testimony. [A. 17, 18.] Referee White "... had the opportunity to observe the witness (Costello) and judge his credibility and demeanor" as to the alleged perjured trial testimony and found his latest testimony to be impeached and discredited. *In re Imbler* (1963) 60 Cal.2d 554, 562, [A. 18, 27].

Based on the distinguished referee's findings, the California Supreme Court, in a full opinion reviewing the facts, discredited Costello's latest testimony and held that no perjured testimony had been given at trial and that no evidence favorable to Mr. Imbler had been suppressed at trial. *In re Imbler, supra,* 60 Cal.2d 554; [A. 18, 22, 24]. On a later writ, the California Supreme Court set aside the death penalty imposed on Mr. Imbler. *In re Imbler* (1964) 61 Cal.2d 556. Mr. Imbler then remained in prison serving concurrently both the murder and the later robbery sentences. [A. 31.]

Several years later, Mr. Imbler filed a federal habeas corpus petition alleging essentially the same grounds for overturning his conviction as had been

considered by the California Supreme Court. The federal district court did not conduct a separate hearing but merely reviewed the California Supreme Court's record.

> "A federal evidentiary hearing on the petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court." *Imbler* v. *Craven* (C.D. Cal. 1969) 298 F.Supp. 795, 797; [A. 32].

In one of the quirks of our federal system, the single federal district judge in essence reversed the decision of the California Supreme Court based on that court's own record. *Imbler* v. *Craven, supra,* 298 F.Supp. 795; [A. 30]. The district court concluded that certain "false," not perjured, testimony was given by two of the prosecution's four identification witnesses which was material to their credibility. *Imbler* v. *Craven, supra,* 298 F.Supp. at 803; [A. 42-43]. Moreover, it found that the prosecutor knew, or should have known, of the falsity of the testimony.

> "Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony."
>
> *Imbler* v. *Craven, supra,* 298 F.Supp. at 809; [A. 53].

The Court of Appeals affirmed the district court's order and Mr. Imbler was released. *Imbler* v. *California* (9th Cir. 1970) 424 F.2d 631.

Under the doctrines applied by the Ninth Circuit, the statute of limitations for Mr. Imbler's claim was deemed tolled while he was in prison.[5] On January 15, 1971, Mr. Imbler filed his Civil Rights Act complaint in this case. [A. 2]. Mr. Pachtman's motion to dismiss was filed on November 2, 1971. [A. 4].

On April 18, 1972, the first amended complaint was filed. [A. 6, 61]. The district court dismissed the action as to Mr. Pachtman on June 30, 1972 [A. 7, 104-112, 113] on the grounds that Mr. Pachtman was entitled to quasi-judicial immunity for the actions of which Mr. Imbler complained. [A. 107-111]. The Court of Appeals affirmed the dismissal on the same basis. *Imbler* v. *Pachtman* (9th Cir. 1974) 500 F.2d 1301. [A. 116-120]. It is from this judgment that Mr. Imbler seeks review by this Court.

SUMMARY OF ARGUMENT

The issue is the nature of immunity to be accorded a prosecutor in a damage suit under the

[5]Cal. Penal Code §2600 provides that "A sentence of imprisonment . . . suspends all the civil rights of the person so sentenced . . ." Cal. Code Civ. Proc. §352(a) provides that "If a person entitled to bring an action . . . be, at the time of action accrued, either: . . . 3. Imprisoned on a criminal charge . . .the time of such disability is not a part of the time limited for the commencement of the action." The Ninth Circuit has concluded that the disability does not apply to actions under the Civil Rights Act and that prisoners may freely bring such actions, but that the tolling provision does apply to extend California's three year limitation for actions ". . . upon a liability created by statute . . ." Cal. Code Civ. Proc. §338(3). *Ney* v. *State of California* (9th Cir. 1971) 439 F.2d 1285, 1287.

Civil Rights Act. This Court has not yet authoritatively spoken on this issue. See *Holton* v. *Boman* (7th Cir. 1974) 493 F.2d 1176, 1177, n.2.

However, this Court has in the past approved an absolute immunity in damage actions for federal prosecutors in the performance of their prosecutorial function. *Yaselli* v. *Goff* (2d Cir. 1926) 12 F.2d 396, aff'd. 275 U.S. 503, approved *Barr* v. *Matteo* (1959) 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335.

Immunities were as much a part of common law causes of action for damages as was liability itself. Judicial immunity (*Floyd* v. *Barker*, 12 Co. Rep. 23, 1608) and the immunity of counsel, witnesses, and judges for slander or libel for words written or spoken in the ordinary course of any judicial proceeding (see *Spalding* v. *Vilas*, 161 U.S. 483, 497, 40 L.Ed. 780, 785, 1895) are of ancient origin.

The enactment of the Civil Rights Act did not abrogate all common law immunities. *Pierson* v. *Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). Specifically it did not abrogate the common law immunities of legislators for legislative acts (*Tenney* v. *Brandhove* 341 U.S. 367, 379, 95 L.Ed. 1019, 71 S.Ct. 783, 1951) or of judges for judicial acts. *Pierson* v. *Ray*, *supra* 386 U.S. at 554, 18 L.Ed.2d at 294. Nor did it abolish the American common law defense of good faith and probable cause for a peace officer making an arrest. *Pierson* v. *Ray*, *supra*, 386 U.S. at 555, 18 L.Ed.2d at 295. Recently, this Court approved a

qualified official immunity for damage actions under the Act against state executives (*Scheuer* v. *Rhodes* (1974) ..... U.S. ....., 40 L.Ed.2d 90, ... S. Ct.....) and school board members (*Wood* v. *Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214, 95 S.Ct. 992).

Every opinion of the Court of Appeals which has considered the matter has held that state prosecutors are entitled to some form of immunity in damage suits under the Civil Rights Act. Overwhelmingly, these opinions hold that a prosecutor is entitled to an absolute quasi-judicial immunity, akin to that of a judge, for actions taken in the scope of his prosecutorial function. However, the Sixth Circuit has indicated that the immunity should not encompass intentional misconduct of a serious nature. *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, cert. den. 409 U.S. 1029.

The parallel common law immunity of counsel for defamation arising out of verbal and written material presented in the ordinary course of a judicial proceeding is an absolute one. It defies logic to have the same act, e.g. posing a question to a witness, be absolutely immune in a damage action for defamation but not in one for violation of civil rights.

An absolute immunity is not only most in accord with precedent but is justified and required by important societal interests. The absolute immunity is workable since an objectively defined prosecutorial function can be identified.

The *Hilliard* case stands out as an aberrant episode in the law of immunity. It is almost devoid of reasoning and does not consider the workability of its standard or its impact on the societal interests promoted by prosecutorial immunity.

The Ninth Circuit's decision in *Imbler,* on the other hand, is directly in the flow of cases, such as *Robichaud* v. *Ronan* (9th Cir. 1965) 351 F.2d 533, which have analysed the conflicting interests in depth and have defined an objective, quasi-judicial function of prosecutors to which absolute immunity pertains.

There can be no serious question that the actions of which Mr. Imbler complains, were within the objective scope of Mr. Pachtman's prosecutorial functions. All of the actions took place in a courtroom in the questioning of a witness on the stand or in preserving the presence of a witness for testimony. If absolute immunity applies to any prosecutorial act it must encompass these actions.

ARGUMENT

I

HISTORICALLY THE COMMON LAW HAS RECOGNIZED THE NEED FOR ABSOLUTE IMMUNITY FROM DAMAGE SUITS FOR JUDICIAL AND QUASI-JUDICIAL ACTIONS

A. THE COURTS HAVE RECOGNIZED A COMMON LAW ABSOLUTE IMMUNITY FROM DAMAGES FOR PROSECUTORIAL ACTS IN NON-CIVIL RIGHTS ACT SUITS

The common law has historically recognized the need to protect judges and others closely identified with the judicial process from the threat of damage suits for actions taken within the scope of their judicial or quasi-judicial functions. See *Scheuer* v. *Rhodes* (1974) ..... U.S. ..... 40 L.Ed.2d 90, 98 n. 4. This immunity has been applied in non-Civil Rights Act damage suits against federal prosecutors.

In 1926, the Court of Appeals for the Second Circuit was confronted with a suit for damages against a special assistant to the Attorney General, named Goff, who was specially appointed to prosecute a single case against Mr. Yaselli before a federal grand jury. Goff was charged with: (1) maliciously obtaining the appointment in order to carry out his scheme against Mr. Yaselli; (2) maliciously and without probable cause charging Yaselli with a crime; and (3) ". . . maliciously, willfully, and corruptly caus [ing] to be introduced and used before the aforesaid grand jury

a great mass of false, misleading . . . irrelevant . . . testimony, and evidence." *Yaselli* v. *Goff* (2d Cir. 1926) 12 F.2d 396, 397-398.

The court, in a scholarly opinion, traced the history of judicial and quasi-judicial immunity back to the time of Lord Coke (Id. at 399) and noted the parallel absolute immunity for defamation. Id. at 403. The court discussed the policies behind the rule of absolute judicial immunity and concluded that they apply equally to a prosecutor.

> "The [prosecutor's] immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case."
>
> *Yaselli* v. *Goff, supra,* 12 F.2d at 406.

The court held that a prosecutor was entitled to absolute immunity for the acts charged.

> "A United States attorney, if not a judicial officer, is at least a quasi-judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the

government apply to a public prosecutor in the performance of the duties which rest upon him."

Yaselli v. *Goff, supra,* 12 F.2d at 404.

The Supreme Court summarily affirmed[6] the decision in *Yaselli* v. *Goff, supra,* (see 275 U.S. 503), prompting Judge Learned Hand in a subsequent classic opinion on immunity to conclude:

"Upon appeal the Supreme Court affirmed this judgment [*Yaselli* v. *Goff*] in a per curiam opinion on the authority of *Bradley* v. *Fisher* and *Alzua* v. *Johnson*. Both those decisions concerned the privilege of a judge, and held that it was absolute, even though his decision was not the result of an honest effort to apply the law to the facts before him, but of a desire to gratify his personal ill-will against the defeated suitor. Thus the conclusion is inevitable that the Supreme Court took the same view as we: i.e., that officers of the Department of Justice, when engaged in prosecuting private persons enjoy the same absolute privilege as judges."

Gregoire v. *Biddle* (2d Cir. 1949) 177 F.2d 579, 580 (footnotes omitted).

The Supreme Court again approved the *Yaselli* doctrine of quasi-judicial immunity in 1959 as follows:

"This Court early held that judges of courts of superior or general authority are absolutely privi-

[6]Summary affirmances are generally accorded qualified precedential value, see *Edelman* v. *Jordan* (1974) 415 U.S. 651, 671, 39 L.Ed2d 662, 677, 94 S.Ct. 1347, 1359.

leged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher (U.S.) 13 Wall 335, 20 L.Ed. 646, and that a like immunity extends to officers of government whose duties are related to the judicial process. Yaselli v. Goff (CA2 N.Y.) 12 F.2d 396, 56 A.L.R. 1239. aff'd per curiam 275 U.S. 503, 7 L.Ed. 395, 48 S.Ct. 155, involving a Special Assistant to the Attorney General."

Barr v. *Matteo,* 3 L.Ed.2d 1434 at 1440, 360 U.S. 564 at 569-570, 79 S.Ct. 1335 (1959).

The Court of Appeals has supported the common law immunity for federal prosecutors by analogizing their position to that of state prosecutors under the Civil Rights Act and noting that there is no reason to distinguish between prosecutorial immunity under the Civil Rights Act and under the common law.

"Bauers v. Heisel [361 F.2d 581, 3rd Cir. 1965] would seem to compel the result that an Assistant United States Attorney is clothed with judicial immunity, unless there is some reason to distinguish between the liability of State prosecutors under the Civil Rights Act and the liability of federal prosecutors under the federal common law created by the *Bivens* [*Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388. 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)] decision. We perceive no reason for such a distinction."

Bethea v. *Reid* (3rd Cir. 1971) 445 F.2d 1163 1166, cert. den. 404 U.S. 1061.

The interests supporting prosecutorial immunity apply equally to state as to federal prosecutors. Looked at solely from the point of the common law, state as well as federal prosecutors are entitled to absolute, quasi-judicial immunity for their prosecutorial acts.

B. THE COMMON LAW ABSOLUTE PRIVILEGE FOR COUNSEL IN DEFAMATION SUITS COMPELS A PARALLEL ABSOLUTE PROSECUTORIAL IMMUNITY

The American common law has always recognized an absolute immunity in defamation actions for counsel engaged in judicial proceedings. Professor Prosser states the rule as follows:

> "As in the case of other acts in his judicial capacity, therefore, the judge is absolutely privileged as to any defamation he may utter, even though he knows it to be false and is motivated by personal ill will towards the plaintiff . . . Likewise the privilege extends to counsel in the conduct of the case. . . ."
>
> Prosser, *Handbook on the Law of Torts,* §114, p. 777-778 (4th Ed. 1971) (footnotes omitted); see also *Yaselli* v. *Goff, supra.* 12F.2d at 403.

One excellent article which reviewed American and English law on the subject up to 1909 summarized the law and the policies behind it as follows:

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech

> should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. The true doctrine of absolute immunity is that, in the public interest, it is not desirable to inquire whether utterances on certain occasions are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual, the privilege is to be exempt from all inquiry as to malice; the reason being that it is desirable that persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that, to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are malicious."
>
> Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 Columbia L.Rev. 463, 469 (1909), (footnotes omitted).

The rule in England at present also protects coun-

sel against damage actions for defamation. In a case holding that a criminal defendant could not sue his barrister for malpractice, Lord Upjohn said:

> "It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest."
>
> *Rondel v. Worsley* (1969) 1 A.C. 191 at 284.

The common law immunity for defamation is obviously not directed *against* persons injured by defamation but is intended to *protect certain actions* in judicial proceedings, including the filing of pleadings, the questioning of witnesses, and the conduct of the trial. The freedom of the participants in a judicial proceeding from the fear of civil liability is deemed to advance the pursuit of justice and to outweigh private claims for compensation.

However, if the very same acts, that is, filing pleadings, questioning witnesses, and conducting the trial, might expose counsel to civil liability under 42 U.S.C. §1983, although not to liability for defamation, the purpose of the historic immunity for defamation would have been substantially undercut. The defamation immunity would no longer achieve its purpose by protecting certain acts; it would merely have the random and meaningless function of defeating liability of a certain kind. Any skilled pleader could always avoid its effect when drafting a complaint against a state prosecutor.

In this case, the essential claims against Mr. Pachtman arise from his questioning of witnesses during a trial. Those acts would unquestionably be accorded absolute immunity in a defamation suit. Yet Mr. Imbler seeks to make the very same acts the basis of a Civil Rights Act damage suit. If Mr. Imbler prevails, no prosecutor could freely question a witness at trial without fear of civil liability, regardless of the defamation immunity. Consequently, unless a prosecutor is accorded absolute immunity under the Civil Rights Act for prosecutorial acts of the type charged, this Court will have effectively abrogated the substance of the historic defamation immunity as well as the parallel quasi-judicial, prosecutorial immunity.

II

A PROSECUTOR IS ENTITLED TO QUASI-JUDICIAL IMMUNITY IN DAMAGE ACTIONS UNDER THE CIVIL RIGHTS ACT

A. INTRODUCTION

The Civil Rights Act, which is a shield against the misuse of state power, is itself subject to abuse. One federal district court reflected that many prisoners do not view a civil action, under the Civil Rights Act or otherwise, as providing ". . . for the redress of genuine grievances or wrongs, but as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but Judges, Jurors, witnesses and everyone having to do with

their conviction." *Roberts* v. *Barbosa* (S.D. Cal. 1964) 227 F.Supp. 20, 21. The Ninth Circuit has noted ". . . that frivolous Civil Rights suits by prison inmates have become a matter of concern to district courts." *Allison v. California Adult Authority* (9th Cir. 1969) 419 F.2d 822, 823. The historic immunities of judicial and quasi-judicial officers were developed to guard against such abuses and should not be deemed abrogated by the Civil Rights Act.

B. JUDICIAL AND QUASI-JUDICIAL IMMUNITY APPLY UNDER THE CIVIL RIGHTS ACT

The Civil Rights Act did not abrogate all common law immunities. This Court has specifically held that judicial and legislative common law immunities were not abolished by the Act.

> "We do not believe that this settled principle of law was abolished by §1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove,* 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."
>
> *Pierson v. Ray,* 386 U.S. 547, 555, 18 L.Ed.2d 288, 295, 87 S.Ct. 1213 (1967); see also *Wood v. Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214, 222, 95 S.Ct. 992, 998.

Moreover, this Court has held that a peace officer's American common law defense of good faith and probable cause in making an arrest was not abrogated by the Civil Rights Act. *Pierson v. Ray, supra,* 386 U.S. at 555, 18 L.Ed.2d at 295, 87 S.Ct. 1213.

In the recent case of *Scheuer v. Rhodes, supra,* ..... U.S. ....., 40 L.Ed.2d 90, the Court discerned no historic common law absolute immunity for all executive actions. Indeed, the Court noted that peace officers traditionally lacked immunity for damages and merely had a defense of good faith and probable cause. Id., 40 L.Ed2d at 102. The Court emphasized another historic concern with respect to executive use of military force:

> "While both federal and state laws plainly contemplate the use of force *when the necessity arises,* the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly and association."
>
> *Scheuer* v. *Rhodes, supra,* 40 L.Ed.2d at 102 (Emphasis added).

Nevertheless, the Court found that a "qualified immunity" was available to state executives for of-

ficial acts within the jurisdiction of the officer. Id., 40 L.Ed.2d at 103. However, on the pleadings the Court could not determine whether the Government had jurisdiction[7] to take the action in question. *Ibid.*

Again in the recent case of *Wood v. Strickland, supra,* the Court relied on "common-law tradition" in construing Section 1983 to encompass a qualified immunity for school board members.

We have shown in Section I that the courts have recognized a common law quasi-judicial immunity for prosecutors. Significantly every circuit has held that the Civil Rights Act does not abrogate quasi-judicial immunity for prosecutorial acts. See Appendix B. Even the *Hilliard* opinion recognizes the applicability of the doctrine of quasi-judicial immunity to damage actions brought against prosecutors under the Civil Rights Act.

> "It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. (Citations)."
>
> *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, 1217.

The only question presented by the cases is the

[7]The qualified immunity discussed in *Scheuer* does not seem to turn on the motive of the executive but on whether he had authority *prima facie,* setting aside motive, to take the action in question. Good faith is relevant only to the extent that (a) the existence of reasonable grounds to believe that military force was necessary, and (b) the existence of a good faith belief that such force was necessary are jurisdictional prerequisites for the Governor's use of military force. *Scheuer* v. *Rhodes, supra,* 40 L.Ed.2d at 103.

parameters of the quasi-judicial immunity. For this purpose, we must examine the interests supporting the immunity.

III

THE PUBLIC INTEREST SUPPORTS ABSOLUTE IMMUNITY FROM DAMAGE SUITS FOR PROSECUTORIAL ACTS

A. GENERAL

> "In all such cases [claims of privilege from liability] the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."
>
> Oliver Wendel Holmes, Jr., *Privilege, Malice, and Intent,* VIII Harv. L. Rev. 1, at 9 (1894).

The interests supporting prosecutorial immunity are set out in Table I in summary form. These interests militate as well against suits in which malice is alleged as in those in which mere negligence or error is claimed. In each case, the interest is injured if the officer is threatened with the harassment of a suit and the possibility of paying damages.

TABLE I

INTERESTS SUPPORTING ABSOLUTE IMMUNITY FROM CIVIL DAMAGES FOR ACTIONS PERFORMED WITHIN PROSECUTORIAL FUNCTION

A. INTERESTS RELATING TO PURSUIT OF JUSTICE

1. Civil damage suits might tend to discourage fearless prosecution and decision making, which duty owed to the public in general, outweighs any duty owed to an individual. See *Pierson* v. *Ray,* 386 U.S. 547, 554; *Bradley* v. *Fisher,* 80 U.S. (13 Wall) 335, 350 (1872).
2. The fear of civil liability might dissuade prosecutors from revealing candidly to the courts or clemency boards weaknesses in the prosecution's case or later discovered evidence, thus injuring the pursuit of justice.
3. The background element of a potential civil damage action might warp the habeas corpus and appellate proceedings, by making judges less willing to find prosecutorial misconduct, and by making government attorneys more unbending and less willing to confess error, thus injuring the pursuit of justice.

B. INTERESTS RELATING TO ADEQUACY OF OTHER REMEDIES

4. A person injured by a wrongful prosecutorial act can immediately seek redress through writs, appeal, or habeas corpus. See Table II. cf. interests supporting judicial immunity: *O'Shea* v. *Littleton* (1974) 414 U.S. 488, 502, 38 L.Ed.2d 674, 687.
5. The prosecutor is subject to more restraints, review, and penalties, including criminal penalties, for wrongful conduct than a private citizen and the deterrent of a civil damage suit is not necessary to enforce proper behavior. See Table II. Compare: *O'Shea* v. *Littleton, supra,* 38 L.Ed.2d at 687.

C. INTERESTS RELATING TO OBTAINING QUALITY PERSONNEL

6. Damage actions, often accruing years after a trial, would discourage many of the most qualified persons from becoming prosecutors. See E. Jennings, *Tort Liability of Administrative officers,* 21 Minn. L.Rev. 263, 271 (1937).

D. INTERESTS RELATING TO JUSTICE SYSTEM ADMINISTRATION

7. The necessity to defend suits alleging malice or wrongdoing would result in a waste of the prosecutor's time and a diversion of his efforts from the public interest in prosecution to the lesser interest in remedying private civil wrongs. See *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 348 (1872).
8. The nature of the claim against a prosecutor for prosecutorial acts involves a kind of collateral attack on a criminal judgment, in which testimony of the trial judge and the jurors as to the impact of the prosecutor's

actions would often be relevant, which would create uncertainty and confusion in the criminal justice system. See *E. Jennings, supra,* p. 271 and *Rondel* v. *Worsley* (1969) 1 A.C. 191.

9. The fear of civil liability might affect the prosecutor's conduct of the trial, taking actions (e.g. calling needless witnesses) to protect against future civil claims although unnecessary for prosecution, resulting in a waste of judicial time and a slowing of the criminal justice system.[8]

E. INTERESTS RELATING TO FAIRNESS

10. It is unfair to demand that prosecutors reveal flaws in their case and evidence adverse to the prosecution and then to permit civil damage suits to be based in part on such evidence or flaws revealed.

11. It is unfair to demand of prosecutors a quasi-judicial standard of behavior,[9] over and above that of a mere adversary, and then to refuse them the immunity from damage suits for such actions accorded to judges.

12. Unlike a private citizen, a prosecutor has a duty to undertake affirmative action

[8]See Rondel v. Worsley (1969) 1 A.C. 191, 228-229, in which Lord Reed said:

> "So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity which would not only be harmful to the client but against the public interest in prolonging trials."

[9]"The prosecutor's objective is justice; his role is not that of a mere advocate." A. 53, see also A.B.A. Standard EC 7-13. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict," quoted in *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, 1217.

in charging and prosecuting wrongdoers and is not free to avoid the risks of liability or suit by non-action and consequently should not be penalized for fearless prosecutorial acts; see Harper and James, *Laws of Torts,* Vol. 2, p. 1634.

F. INTERESTS RELATING TO DIFFICULTY OF PROOF

13. The nature of the claim against a prosecutor involves the mental processes of a decision maker in a specialized area, which would be subject to lay jury opinion and perhaps to the second guessing of other experts, which result would be undesirable. See E. Jennings, *supra,* 21 Minn. L.Rev. at 273.

14. Proving damages against the prosecutor would often require speculation as to the effect the violation had on the conviction which would often require retrying the criminal case in the civil action with different standards of proof and rules of procedure.

B. COMPELLING INTERESTS REQUIRE PROTECTION AGAINST SUIT AND NOT MERELY A DEFENSE AGAINST A JUDGMENT

This Court recognized that immunity from suit and not merely a defense against possible judgment was required by the public interest in holding for an absolute privilege against defamation suits for acts within the scope of official duty.

> ". . . [One competing interest is] the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."
>
> *Barr* v. *Matteo,* 360 U.S. 564, 565, 3 L.Ed.2d 1434, 1438, 79 S.Ct. 1335 (1959).

Lord Fry's statements with respect to the absolute privilege of witnesses and judges in suits for defamation are equally valid with respect to quasi-judicial immunity for prosecutors.

> "It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."
>
> *Munster* v. *Lamb* (1883) 11 Q.B.D. 588, 607 C.A., quoted approvingly by Lord Reid in *Rondel* v. *Worsley* (1969) 1 A.C. 191 at 229.

In the analogous situation of legislative immunity this Court focused on the fact that the immunity should not be based on a trial decision as to motive.

> "The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of judgment against them based upon a jury's speculation as to motives."
>
> *Tenney* v. *Brandhove,* 341 U.S. 367, 377, 95 L.Ed. 1019, 1027, 71 S.Ct. 783 (1951).

In a fine article reviewing the policies supporting judicial immunity, the writer reached the following conclusion, having equal applicability to quasi-judicial immunity:

> "The cumulative effect of the suggested reasons for the immunity . . . would appear sufficiently to justify its inclusion of malice, in that malice, equally with any other basis of liability, is subject to the vagaries of proof and capable of fictitious allegation in purely vexatious suits infringing upon judicial time, impartiality, independence, and finality."
>
> Jennings: *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263, 273, (1936).

The courts have always been properly concerned with the impact of defending a suit, and not merely with the outcome of the trial. This Court almost a century ago noted a tendency to ascribe malice to any undesired result.

"Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge . . . [T]he disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

Bradley v. *Fisher supra,* 80 U.S. (13 Wall.) at 348, 20L.Ed. at 650.

The Court went on the say:

"The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."

Bradley v. *Fisher, supra,* 80 U.S. (13 Wall.) at 354, 20 L.Ed. at 651.

Judge Learned Hand cogently stated the need for an objective standard protecting against suit as well as trial, as follows:

> "... [I]t is impossible to know whether the claim is well founded until the case has been tried, and ... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith."
>
> *Gregoire* v. *Biddle* (2d Cir. 1949) 177 F.2d 579, 581; quoted with approval in *Barr* v. *Matteo, supra,* 360 U.S. at 571, 3 L.Ed.2d at 1441.

Clearly, then the public interest supports a form of immunity which guards against the vexation and uncertainty of litigation rather than merely providing a qualified defense against judgment.

C. THE CONCEPT OF ALTERNATIVE REMEDIES AND RESTRAINTS SUPPORTS ABSOLUTE IMMUNITY

One cluster of interests which is generally cited to support judicial immunity is directly applicable to the quasi-judicial immunity of prosecutors: those relating to the availability of other restraints to prevent misconduct and of other remedies to correct the effects of any misconduct.

The Court in *Bradley* addressed itself to the first of these considerations as follows:

> "In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily or oppressively, they may be called to an account by impeachment and suspended or removed from office."
>
> *Bradley* v. *Fisher, supra.* 80 U.S. (13 Wall.) at 350, 20 L.Ed. at 650.

Veeder suggests that the parallel defamation immunity in judicial proceedings is also supported by the concept of alternative remedies and restraints, which has equal applicability to prosecutorial actions.

> "Moreover, underlying this whole doctrine of absolute immunity is the conception of an alter-

native remedy. Although the law, for reasons of public policy, denies an action for defamation, the occasions to which immunity applies almost always afford other remedies, which minimize, if indeed they do not always afford adequate relief for, the damage which a person defamed may have sustained . . . In the case of judicial proceedings, in which the rule of immunity has the widest scope, the underlying idea is that there is a tribunal whose proceedings are governed by formal methods specially designed for the orderly and efficient performance of the functions of those who participate in them; a tribunal presided over by a judge or judicial officer, specially equipped for his duties by character, learning and experience, who has the power, and, presumably, the will, to regulate and discipline all those who participate or appear before him. Judicial procedure implies notice to persons in interest, with the right to appear in person and by witnesses in answer to any charges that may be made, and the right to a formal judgment by an impartial court and jury . . . Jurors, witnesses, counsel and parties litigant who overstep the bounds of decorum may be reprimanded, fined or punished by imprisonment, and the defamatory utterance may be expunged from the record."
>
> Veeder, *Absolute Immunity in Defamation, supra,* at 470-471.

This Court in denying equitable relief against a judge charged with discrimination noted that remedies for judicial misconduct existed in terms of: (1) a right

to a change of venue or substitution of the judge; (2) review on direct appeal or an postconviction collateral review; (3) disciplinary proceedings against the judge; (4) federal habeas corpus relief; and (5) federal criminal prosecution under 18 U.S.C. §242. *O'Shea* v. *Littleton* (1974) 414 U.S. 488. 38 L.Ed.2d 674, 687, 94 S.Ct. 669. All of these, save item (1), apply with equal vigor to state prosecutors together with a staggering array of other restraints and remedies set out below in Table II.

TABLE II

LEGAL RESTRAINTS ON, AND REMEDIES FROM, DISTRICT ATTORNEY'S PROSECUTORIAL MISCONDUCT DESPITE IMMUNITY FROM CIVIL DAMAGES

1. REMOVAL FROM OFFICE
   - (a) By Election: Cal. Const. Art. XI, §4(c); Los Angeles County Charter Art. IV §12
   - (b) By Recall: Los Angeles County Charter Art. XI §50
   - (c) By Judicial Process:
     - (i) upon accusation of "willful and corrupt misconduct in office" by a grand jury and trial.
       Government Code Sections 3060, 3073.
     - (ii) As added penalty upon conviction of crime showing official misconduct. Penal Code §661.
   - (d) By civil service discharge (of a deputy) Los Angeles County Charter Art. IX §34(13).

2. EQUITABLE POWER OF COURTS
   - (a) Federal Courts: 42 USC 1983, 1985, restrain bad faith harrassment, e.g., *Younger* v. *Harris* (1970) 401 U.S. 37, 27 L.Ed.2d 669 (injunctive); *Steffel* v. *Thompson* (1974) 415 U.S. 452, 39 L.Ed.2d 505 (declaratory).
   - (b) State Courts:
     - (i) Taxpayers' actions to prevent unlawful acts by public officials, Code of Civil Procedure Section 526a, see *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 268; *County of Los Angeles* v. *Superior Court* (2d Dist. 1967) 253 Cal.App.2d 670, 677-679.
     - (ii) State injunctive action by a person injured to prevent violation of his rights, Code of Civil Procedure 526; see *Pitchess v. Superior Court* (2d Dist. 1969) 2 Cal.App.3d 644, 648.
     - (iii) Federal Civil Rights Act equitable actions prosecuted in State courts, see *Brown* v. *Pitchess* (1975) 13 Cal.3d 518.
     - (iv) State declaratory relief actions, see *Zeitlin* v. *Arneberyh* (1963) 59 Cal.2d 901, 906.
3. SUPERVISION BY ATTORNEY GENERAL
   Cal Const. Art. V. Section 13; Gov. Code §12550

4. DIRECT JUDICIAL REVIEW

(a) e.g., mistrial, new trial,[10] exclusionary rule, jury instructions, see *Alderman* v. *United States* (1969) 394 U.S. 165, see also *Kaplan* v. *Superior Court* (1971) 6 Cal.3d 150.

(b) Control of court proceedings, Code of Civil Procedure Section 128.[11]

(c) Appeal (Penal Code §1235 et seq.), state habeas corpus (Penal Code Section 1473), Federal habeas corpus (28 U.S.C. §2254).

5. PROFESSIONAL REGULATION

California State Bar disciplinary proceedings

Bus. & Prof. Code §6000 et. seq., esp. §6043, 6077, and 6106; Rules of Professional Conduct foll. §6076, e.g., Rule 7-105.

"In presenting a matter to a tribunal, a member of the State Bar shall: (1) employ such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law . . ." and rule 7-107

"A member of the State Bar shall not (a) Suppress any evidence that he or his client has a legal obligation to reveal or produce . . ."

[10]"When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . . 5. . . . [W]hen the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." Penal Code 1181.

[11]Every Court shall have power: . . . 5. To control in the furtherance of justice, the conduct . . . of all . . . persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. REVIEW BY GRAND JURY

"The grand jury shall inquire into: . . . (c) the willful or corrupt misconduct in office of public officers of every description within the County."

Penal Code §919.

7. CRIMINAL PENALITIES

(a) Federal: 18 U.S.C. §242, see *O'Shea* v. *Littleton, supra,* 38 L.Ed.2d at 687-688.

(b) State: penalties for various acts.

(i) illegal wiretapping or eavesdropping Penal Code 632, 636.

(ii) Solicitation of perjury, Penal Code 653f.

(iii) false imprisonment, Penal Code 236, 237.

(iv) Maliciously procuring search or arrest warrant, Penal Code 170.

(v) Assaulting or beating a person under color of law, Penal Code 149.

(vi) False arrest under color or pretense of law, Penal Code 146.

(vii) Unlawfully influencing testimony, Penal Code 137.

(viii) Preventing or dissuading a witness from testifying, Penal Code 136.

(ix) Destroying or concealing evidence, Penal Code 135.

(x) Preparing false evidence, Penal Code 134.

(xi) Procuring execution of innocent man by perjury or subornation of perjury, Penal Code 128.

(xii) Subornation of perjury, Penal Code 127.

(xiii) Conspiracy, Penal Code 182:

"If two or more persons conspire: . . .

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action, or proceeding.

. . .

5. To . . . pervert or obstruct justice, or the due administration of the laws.

They are punishable . . ."

(xiv) Professional misconduct, Bus. & Prof. Code §6128

"Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party. . . ."

8. MONETARY COMPENSATION

The state may provide monetary compensation to pardoned or innocent person who served part of a sentence. Penal Code Sections 4900-4906.

D. AVOIDANCE OF COLLATERAL ATTACK ON JUDGMENTS SUPPORTS ABSOLUTE IMMUNITY

Another cluster of interests which support judicial immunity are those relating to the prevention of collateral attacks on judicial proceedings by way of civil damage actions. The basic interest was nicely put by Lord Morris of Borth-Y-Gest in *Rondel* v. *Worsley* as follows:

> "A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified: it can be kept continually under review. I cannot think, however, that it would be in the public interest to permit a sort of unseemly excrescence upon our legal system whereby someone who has been convicted and has, without success, exhausted all the procedures for appeal open to him should seek to establish his innocence (and to get damages) by asserting that he would not have been convicted at all but for the fact that his advocate failed to exercise due care and skill."

Rondel v. *Worsley, supra,* (1969) 1 A.C. at 250.

E. THE INTEREST IN MAINTAINING QUALITY PROSECUTORS IN THE FEARLESS DISCHARGE OF THEIR DUTIES SUPPORTS ABSOLUTE IMMUNITY

A legal realist might argue that the fear of suit is less significant currently since governmental entities have adopted schemes to provide for the representation and indemnification of employees acting within the scope of their employment.

It is true that Mr. Pachtman is being represented by the County Counsel pursuant to broad authority to represent county officers in civil actions. County Charter, Article VI, section 21. See also Government Code Section 825. The Code also provides a scheme for payment of judgments against employees where the public entity has provided the defense (Government Code Section 825) and for indemnification in other instances (Government Code §825.2).

However, it is not clear that the provisions relating to indemnification and payment of judgments apply to suits under the Civil Rights Act, which are not governed by and do not come within the scheme of the Tort Claims Act.[12]

Moreover, a public entity in California is not authorized to pay punitive damages. Government Code Section 825. And the Court of Appeals has held that

[12]A California appellate court opinion which has since been vacated and set for hearing in the California Supreme Court suggested that the Government Code provisions for payment of judgments and indemnification did not apply to actions under 42 U.S.C. §1983, whether or not brought in the state courts. *Williams v Horvath* (2d Dist. 1975) 45 Cal.App.3d 422.

punitive damages may be awarded under the Civil Rights Act. *Sostre* v. *McGinnis* (2d Cir. 1971) 442 F.2d 178, 205; *Caperci* v. *Huntoon* (1st. Cir. 1968) 397 F.2d 799, cert den. 393 U.S. 940 (1968); *Basista* v. *Weir* (3d Cir. 1965) 340 F.2d 74.

Finally, many prosecutors do not remain in public law as a career but go into private practice individually or with a firm. There are no provisions to compensate any such person for any loss of earnings he might suffer as a result of time spent in depositions or in trial or in completing interrogatories.

Consequently, a modern prosecutor still has good reason to fear the consequences of being embroiled in a civil damage action.

F. ABSOLUTE IMMUNITY DOES NOT BREED MISCONDUCT IN LIGHT OF THE OTHER RESTRAINTS ON PROSECUTORIAL ACTIONS

Nor do we believe that immunity from civil suit results in increased misconduct on the part of prosecutors, especially in light of the restraints listed on Table II. The statement of this Court with respect to the absolute privilege against defamation for official publications applies with equal vigor to this matter.

> "It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional

instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner."

Barr v. *Matteo, supra,* 3 L.Ed.2d at 1444, 360 U.S. at 576.

IV

THE WEIGHT OF CASE LAW SUPPORTS ABSOLUTE IMMUNITY UNDER THE CIVIL RIGHTS ACT FOR PROSECUTORIAL ACTS

A review of the Circuits in Appendix B shows that six circuits clearly hold for absolute immunity under the Civil Rights Act for actions taken within the prosecutional function and that one circuit, the Seventh, upon a careful study of the decisions so holds.

Only one circuit, the Sixth, seems to hold that immunity does not apply if the prosecutor acted maliciously. One circuit, the Fourth, has reserved the question. The position of another circuit, the Tenth, is unclear but the circuit's latest clear holding on the question supports an absolute immunity.

The prevailing rule has been stated as follows:

"Therefore, if the conduct charged is within the scope of a prosecutor's normal function, he is

cloaked with quasi-judicial immunity from civil liability under the Civil Rights Acts. (Citations)."

Tyler v. *Witkowski* (7th Cir. 1975) 511 F.2d 449, 450.

The prevailing view establishes an objective scope of immunity based on prosecutorial jurisdiction, akin to the rule governing judicial immunity.

". . . [W e] believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, (Citation); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo American law as judicial immunity itself. (Citations)."

Bauers v. *Heisel* (3rd Cir. 1966) 361 F.2d 581, 590; accord: *Kauffman* v. *Moss* (3rd Cir. 1970) 420 F.2d 1270.

In a case where the state prosecutor was alleged to have suppressed information at trial, the Court held:

"Since we think that the facts alleged fall within acts that may be categorized as prosecutorial, rather than investigatory, functions, dismissal as to Moss [the prosecuting attorney] was proper. When

a prosecutor is acting within the scope of his proper prosecutorial capacity, these actions are cloaked with the same immunity granted to judges. (Citation).

We specifically reserve the question of the liability of a prosecutor acting within an investigatory capacity."

Barnes v. *Dorsey* (8th Cir. 1973)
480 F.2d 1057, 1060; accord *Duba* v. *McIntyre* (8th Cir. 1974) 501 F.2d 590, 592.

One of the most cited appellate decisions on prosecutorial immunity under the Civil Rights Act is the Ninth Circuit case of *Robichaud* v. *Ronan* (1965) 351 F.2d 533. That case approved the absolute immunity of prosecutors for prosecutorial acts but held that such absolute immunity did not apply to investigatory acts which were outside the prosecutorial function.

"Our court has held, in recent decisions, that a prosecuting attorney is immune from liability for damages under 42 U.S.C. §1983. Agnew v. Moody, supra; Harmon v. Superior Court, supra; Sires v. Cole, supra. The foundation of these opinions is that prosecuting attorneys, in acting as quasi-judicial officers, should enjoy the same immunity from civil liability as that which protects a judge. We adhere to our former opinions, but we cannot extend the doctrine of immunity beyond its purpose.

* * *

"The key to the immunity previously held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process."

Robichaud v. Ronan, supra, 351 F.2d at 536

In an analysis cited with approval in all the decisions relied upon by Mr. Imbler, the Ninth Circuit defined an objective test for prosecutorial immunity.

"We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity -integral relationship between his acts and the judicial process-ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? (Citations) To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Robichaud v. *Ronan, supra* 351 F.2d at 536-537; see *Hilliard* v. *Williams, supra,* 465 F.2d at 1217; *Hampton* v. *City of Chicago, supra,* 484 F.2d at 608 (quoted in full); *Holton v. Boman, supra,* 493 F.2d at 1178 (quoted in full); see also *Imbler* v. *Pachtman, supra,* 500 F.2d at 1302.

The *Hilliard* case, on the other hand, treats us to a parade of horribles gleaned from the pleadings (465 F.2d at 1214-1217), cites as authority a group of cases which recognize absolute immunity for prosecutors acting within the scope of their prosecutorial function (465 F.2d at 1217), and blandly concludes:

"We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant."

Hilliard v. Williams, supra, 465 F.2d at 1218.

No law, logic, or analysis of interests is offered to support this qualified prosecutorial immunity. Nor is there any definition of the scope of the immunity, though we may surmise that the court did not believe it extended to allegations of intentional misconduct of a serious nature at trial (assuming that the act of suppression occurred at trial).

But the inappropriateness of defining the scope of a prosecutor's quasi-judicial function by his alleged motivations has been analysed in depth by such scholars as Judge Learned Hand, who said:

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection

shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

Gregoire v. *Biddle* (2d Cir. 1949)
177 F.2d 579, 581

In the analogous situation of absolute immunity in defamation suits for acts taken in a judicial proceeding, Mr. Veeder summarized the policy analysis as follows:

"It may be urged, of course, that a false statement, known to be untrue, and dictated by malice, should always be the subject of a civil remedy. But this bald method of stating the question assumes both the untruth and the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law should give damages to an injured person. But this is not the state of things under which this question of law has to be determined. Whether statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of pub-

lic policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A participant in judicial proceedings may be utterly free from malice, and yet in the eyes of a jury be open to that imputation; or he may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands."

Veeder, *Absolute Immunity in Defamation, supra,* at 470 (footnotes omitted.)

Hilliard did not address itself to these issues. The weight of the case law and the reasoning supporting quasi-judicial immunity require that prosecutorial immunity be absolute and unrelated to motivation within an objectively defined scope of prosecutorial duties.

V

AN OBJECTIVE PROSECUTORIAL FUNCTION CAN BE DEFINED

We have shown that an objective standard should be applied as most in keeping with persuasive precedent and with the interests served by the immunity. We now intend to show that an objective standard can in fact be defined.

A. THE OBJECTIVE STANDARD SHOULD BE BASED ON THE PRIMA FACIE NATURE OF THE FUNCTION AND ITS RELATION TO THE JUDICIAL PROCESS

It is beyond question that a prosecutor has many functions aside from the prosecutorial function, as a judge may have functions beyond his judicial function. *Ex Parte Virginia* (1879) 100 U.S. 339, 348, 25 L.Ed. 676, 680. The most common and significant functions of the district attorney are distinguished in Table III, below.

TABLE III

A SCHEMATIC BREAKDOWN OF THE VARIOUS FUNCTIONS OF THE DISTRICT ATTORNEY

District Attorney Functions	(1)	PROSECUTORIAL: QUASI-JUDICIAL Deciding whether to institute criminal proceedings, conduct of proceed-

ings, trial related investigations, etc. [See Table IV]

(2) EXECUTIVE

Actions as department head, e.g., demoting, or discharging staff members, ordering supplies.

(3) MINISTERIAL

Non-discretionary official acts, e.g., complying with court order to turn a particular item. See also Government Code Section 26503 (receipts), 26504 (accounting for money), Civil Code Section 1181 (taking acknowledgments).

(4) INVESTIGATORY

Actions relating to crime prevention or apprehension but not tied to a court proceeding, e.g., making or directing an arrest without a warrant or conducting a search.

(5) ADVISORY OR CIVIL LEGAL FUNCTIONS

Rendering general legal advice not directly connected to a criminal proceeding or performing civil legal functions. [In many California counties, the district attorney is the civil legal advisor for the County. Government Code Section 26520, et. seq. In the larger counties, including Los Angeles County, this function is assigned to the County Counsel. Government

Code Sections 26529, 27640, et. seq., Los Angeles County Charter Art. VI, §21. However, the district attorney continues to have certain civil functions, e.g., Government Code §26525 (collection of monies unlawfully spent), 26521 (collection of fines).]

(6) PUBLIC OFFICIAL

The district attorney is a leading public official and has duties and expectations flowing therefrom. For instance, various ordinances expect him to cooperate on matters involving the criminal justice system. For example, Los Angeles County Administrative Code Section 171 (cooperation with respect to bail bonds), 751 (member of commission on Judicial Procedures), 1034 (participation in Narcotics and Dangerous Drugs Commission), 1170 (cooperation with Delinquency and Crime Commission), 1616 (coordination with Human Services Department); see also Government Code §26500.5.

Outside Scope of Office —INDIVIDUAL ACTS

wholly outside objective scope of office, e.g., political campaigning, acceptance of a bribe.

Obviously, the core elements of a prosecutor's quasi-judicial duties are reviewing evidence to determine whether to institute criminal proceedings, filing charges, presenting evidence, and generally conducting the proceeding. See *Yaselli* v. *Goff, supra,* 12 F.2d 396. However, some practical fleshing out can be given to the concept by a review of the various statutes assigning quasi-judicial duties to the district attorney. The broad brush stroke outline of a district attorney's prosecutorial duties is displayed on Table IV below.

TABLE IV

THE PROSECUTORIAL FUNCTION: A FUNCTIONAL DEFINITION FROM THE STATUTES

1. INSTITUTING PROCEEDINGS FOR ARREST WARRANTS:

   "The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed . . ."
   Government Code §26501; see also Penal Code Section 980.

2. ADVISING GRAND JURY IN CRIMINAL MATTERS.

   ". . . [The district attorney] shall attend before and give advice to the grand jury whenever cases are presented to it for its consideration." Government Code §26501; see also Penal Code §§934, 935.

3. DRAWING INDICTMENT AND INFORMATION.

   "The district attorney shall draw all indictments and informations."
   Government Code §26502.

4. PROSECUTING ALL CRIMINAL ACTIONS, INCLUDING CONTROL OF COURT PROCEEDINGS ON BEHALF OF THE PROSECUTION.

   "The district attorney is the public prosecutor. He shall attend the courts and conduct on behalf of the people all prosecutions for public offenses."
   Government Code §26500; see Penal Code §619(5).

5. INCIDENTS OF CRIMINAL ACTIONS:
   - extradition, Penal Code §§1548.3, 1551.3, 1554.2
   - filing information, Penal Code §860
   - bail reduction, Penal Code §1289
   - subpoena witnesses, Penal Code §§939.2, 1326

6. TERMINATING CRIMINAL ACTIONS.

   "The court may, either of its own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed. . . ."
   Penal Code §1385.

7. STATEMENT OF VIEWS FOR USE OF DEPARTMENT OF CORRECTIONS.

   "Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the

clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed. . . ."
Penal Code §1203.01.

8. ASSISTANCE ON CRIMINAL APPEALS.
"It shall be the duty of the district attorney to cooperate with and assist the attorney general in presenting all criminal matters on appeals."
Penal Code §1256.

9. FACTS AND RECOMMENDATION REGARDING PARDON.
"When an application is made to the Governor for pardon or commutation of sentence, or when an application has been referred to the Adult Authority, he or it may require the judge of the court . . . or the district attorney by whom the action was prosecuted, to furnish him or it, without delay, with a summarized statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing said application, together with his recommendation for or against the granting of the same and his reason for such recomendation."
Penal Code §4803; see also Penal Code §4852.12.

10. PARTICIPATION IN JUVENILE PROCEEDINGS.
"In a juvenile court hearing, where the minor who is the subject of the hearing is represented by counsel, the district attorney shall, with the consent or at the request of the juvenile court judge, appear and participate in the hearing to assist in the ascertaining and presenting of the evidence. . . ."
Welfare and Institutions Code §681.

11. ENFORCING VARIOUS RESTRAINTS.
- injunction for false advertising, Business and Professions Code §17535.
- giving notice to abate nuisance, Penal Code §373(a)
- instituting civil or criminal actions to abate nuisance, Civil Code §§3491, 3494; Penal Code §§373(a), 11306; Code of Civil Procedure §731.

Each specific duty includes incidents necessary to the discharge of the duty. For example, conduct of a trial requires interviewing witnesses prior to putting on the People's case. In the analogous defamation immunity, the English courts have held:

> "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must, as a necessary consequence involve that which is a step towards and is a part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove."
>
> *Watson* v. *M'Ewan* (1905) A.C. 480, 487.

When a district attorney participates in investigations of crime where there is no pending criminal

proceeding, such might be viewed as an investigatory, rather than a prosecutorial, function. However, any trial attorney would agree that interviewing witnesses prior to trial and conducting further investigation to prepare for trial are normal actions of a trial counsel and consequently are part of the prosecutorial function. It was this type of investigation by Mr. Pachtman and the Adult Authority, after the trial but prior to the clemency hearing, which led eventually to Mr. Imbler's release. Surely, this type of investigation is uniquely prosecutorial, in the best sense of that word, implying an officer of justice and not merely an advocate, and should be accorded absolute quasi-judicial immunity.

The objective scope of absolute quasi-judicial immunity for prosecutorial acts should therefore include all actions which, without reference to motive, are within the normal scope of a prosecutor's quasi-judicial duties and are prima facie in accordance with those duties. A prosecutor's quasi-judicial duties include those listed on Table IV and the incidents thereof. In general, quasi-judicial functions can be summarized as those instituting judicial proceedings, advising or presenting charges to a grand jury, drawing or filing court pleadings, the conduct of criminal proceedings, and all official statements or assistance with respect to sentencing, pardon, or clemency.

B. UTILIZING A HABEAS CORPUS PROCEEDING AS AN OBJECTIVE STANDARD OF IMMUNITY DOES VIOLENCE TO THE INTERESTS SUPPORTING THE IMMUNITY AND TO THE GREAT WRIT ITSELF

Any attempt to burden the writ of habeas corpus with unrelated civil side effects should be viewed with great suspicion. The habeas corpus proceeding is designed to test the lawfulness of government custody of an individual. *Townsend* v. *Sain* (1963) 372 U.S. 293, 311, 9 L.Ed.2d 770, 784, 83 S.Ct. 754. It is not designed to assign blame among officers of the government.[13]

Mr. Pachtman, was not represented at the habeas corpus proceeding before Judge Ferguson, (A. 30), nor would the government officer accused of wrongdoing normally be represented. Since the issue is the lawfulness of custody, only the person having custody, in this case the warden, was represented (A. 30).

If the habeas corpus proceeding were to be a determinant of civil liability or of immunity, the government officers accused of misconduct would naturally wish to appear and possibly even to intervene. The district attorney as a county official would be represented by the County Counsel, city police would be represented by the City Attorney, while the Attorney

[13]"If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immedate or speedy release - the traditional purpose of habeas corpus." *Preiser* v. *Rodriguez* (1973) 411 U.S. 475, 494, 36 L.Ed.2d 439, 453, 93 S.Ct. 1827.

General would represent any accused state officials. The result would truly be an unseemly excrescence on the writ proceeding, leading to questions and evidence designed to protect against civil liability rather than to the expeditious resolution of the lawfulness of custody.

Moreover, the determinant would be irrational because it would be random. Those acquited or otherwise not in custody would not be able to win a favorable habeas corpus ruling.

The outcome of a habeas corpus proceeding, therefore, would be a totally inappropriate screening device to test the immunity of prosecutors. It would be unfair to the prosecutors who are not represented at the proceeding. It would be unfair to those ineligible to maintain a habeas corpus proceeding. But most significantly, it would warp the purpose of the Great Writ.

VI

RESPONDENT PACHTMAN IS ENTITLED TO ABSOLUTE IMMUNITY FOR THE CLAIMS PRESENTED

Petitioner's claims amount to allegations that: (1) Mr. Pachtman intentionally asked incomplete or misleading questions of certain prosecution witnesses during the course of the trial; (2) that knowing the truth, Mr. Pachtman failed to correct false testimony during the trial; and (3) that Mr. Pachtman asked certain police officers who came to the courtroom to arrest a prosecution witness, to refrain from arresting the witness until his testimony at the trial had been completed.

See *Brief of Petitioner,* pages 6-8. All of these acts pertain directly to the conduct of the prosecution's case and are at the heart of the prosecutorial function.[14] If there is to be absolute immunity for prosecutorial acts at all, it must cover these claims.

The Courts have repeatedly held that the questioning of witnesses and the introduction of evidence at trial are actions within the protected prosecutorial function, regardless of claims of knowing use of perjured or fradulent testimony or evidence, or the alleged violation of the right against self incrimination. *Kauffman* v. *Moss* (3rd Cir. 1970) 420 F.2d 1270, *United States ex. rel. Moore* v. *Koelzer* (3rd Cir. 1972) 457 F.2d 892; *Barnes* v. *Dorsey* (8th Cir. 1973) 480 F.2d 1057; *Berg v. Cwiklinski* (7th Cir. 1969) 416 F.2d 929; *Ney* v. *State of California* (9th Cir. 1971) 439 F.2d 1285, *Imbler* v. *Pachtman* (9th Cir. 1974) 500 F.2d 1301, *Kostal* v. *Stoner* (10th Cir. 1961) 292 F.2d 492; see also *Yaselli* v. *Goff, supra,* 12 F.2d 396.

Nor is it unfair that Mr. Pachtman should be immune from damages under the Civil Rights Act for such claims. Mr. Imbler's counsel, a deputy public defender, could have corrected any of the "false" testimony presented at Mr. Imbler's trial.

> "Respondent's position is that any errors, allegedly committed by the prosecution could have been cured by action of defense counsel . . . It is clear

[14]The Ninth Circuit held these activities to be an "integral part of the judicial process." *Imbler* v. *Pachtman, supra,* 500 F.2d at 1302. (A. 117)

that defendant's public defender should have done so.'"[15] Ferguson, J. *Imbler* v. *Craven, supra,* A. 53-54; see also A. 22.

But if any damage action were filed against the public defender under the Act for violation of the right to (competent) counsel,[16] the public defender could defend on the grounds that he either was not acting under color of state law or was entitled to quasi-judicial immunity. *John* v. *Hurt* (7th Cir. 1973) 489 F.2d 786; *Brown* v. *Joseph* (3rd Cir. 1972) 463 F.2d 1046; *French* v. *Corrigan* (7th Cir. 1970) 432 F.2d 1211, cert. den. 401 U.S. 915. Had Mr. Imbler been represented by a private counsel, such as Mr. Hanson, no Civil Rights Act claim could have been stated against counsel since he would not have been acting under color of state law. See *Lefcourt* v. *Legal Aid Society* (2nd Cir. 1971) 445 F.2d 1150; *Steward* v. *Meeker* (3rd Cir. 1972) 459 F.2d 669.

A persuasive argument that immunity rather than liability under the Civil Rights Act for counsel most promotes justice was made in an action in which a Public Defender was sued under the Act and asserted and was accorded quasi-judicial immunity. The Court said:

> "Moreover, as stated in the Public Defender's brief, 'the most probable result of such a decision [liability under the Civil Rights Act] would be the exact opposite of what the courts want. Both

[15]Judge Ferguson thus under Mr. Imbler's theory laid the foundation for a civil suit against the public defender, who like Mr. Pachtman, was not represented at the habeas corpus proceeding.

[16]The claim was raised in the state habeas corpus proceeding A.28.

> the Court and the Public Defender's Office [seek] adequate representation of defendants in criminal proceedings, as well as the [expeditious] handling of cases. However, if a civil rights suit from unsatisfied clients is a constant threat to the Attorney involved, then there would be a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and protecting his client.' "
>
> *Brown* v. *Joseph* (3rd Cir. 1972) 463 F.2d 1046, 1049.

Similarly, the prosecutor would be confronted with an intrinsic conflict between representing the People and protecting himself. In addition, the prosecutor has an obligation to do justice.

> "The prosecutor's objective is justice; his role is not that of a mere advocate."
>
> *Imbler* v. *Craven, supra,* A. 53.[17]

There would be a conflict between the prosecutor's duty to do justice by revealing flaws in his case and his interest in protecting himself from civil liability. Certainly, the prosecutor's duties to the People and to justice outweigh a private claimant's right to civil compensation. The law should not expect heroic action as a norm. Therefore, civil liability should not be created

[17]See also A.B.A. Code of Professional Responsibility, E.C. 7-13 "[The public prosecutor's] duty is to seek justice, not merely to convict" and In re Ferguson (1971) 5 Cal.3d 525, 487 P.2d 1234.

which might cause conflict with the Prosecutor's overriding duties to the People and to justice.[18]

Moreover, the futility of determining whether the alleged "false" testimony injured Mr. Imbler, and if so to what extent, is demonstrated in this case. Would the 1961 trial jury have been swayed by the fact that witness Costello had been involuntarily rather than voluntarily committed to a mental institution? A general instruction on mental disease was given, to which that issue is irrelevant. See Attachment C, being Instruction 36 in the trial of *People* v. *Imbler,* L.A. Crim. 240, 368, of which we ask this Court to take judicial notice. Would the trial jury have been influenced by the fact that witness Costello was convicted of more than the one felony to which he admitted? An instruction on conviction of a felony was given, to which multiple convictions are irrelevant. See Attachment D, being Instruction 35, in the trial of *People* v. *Imbler, supra.* To call upon a civil jury to decide in 1975 the impact a particular question or inference had on a criminal jury trial in 1961 strains the judicial process beyond all reason.[19]

[18]Compare: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." *Bradley* v. *Fisher, supra,* 80 U.S. at 347, 20 L.Ed. at 649.

[19]Lord Pearce commented in Rondel v. Worsley, *supra,* 1 A.C. at 255 that: "When counsel wishes on reflection at the end of a case that he had asked a question or called a witness or (about equally often) that he had *not* asked that question or called that witness, it may well be that the thing, which he now wishes otherwise, helped rather than hindered his case in the minds of the jury, if the truth could be known, which it cannot." Lord Morris said: " A trial upon a trial would raise speculation upon speculation." Id. at 250.

Petitioner argues that at least the act of asking the police to refrain from arresting a prosecution witness until his testimony was complete was outside the prosecutorial function. *Brief of Petitioner* at page 50-53. Petitioner supports this contention with cases holding that where a prosecutor participates in an arrest or search he is acting in an investigatory capacity. The comparison is completely fallacious. There is no police or investigatory role in asking a witness not be arrested or taken from the Court prior to testimony. It is a normal role of counsel to provide for the presence of his witness at the court and to preserve the continuity of his case. In any event, what federally protected right is violated by asking that a witness not be arrested until his testimony is complete? The claim is frivolous.

The charges made against Mr. Pachtman relate to acts clearly within the scope of the quasi-judicial function of a prosecutor and consequently absolute immunity from damage suits, akin to judicial immunity, should apply.

VII

CONCLUSION

A prosecutor in acting within his properly defined prosecutorial function is an indispensable part of the judicial process. Unlike an executive, he is subject to constant review and supervision by the judiciary of his quasi-judicial acts. In filing charges or arguing for conviction or for a particular disposition, he is akin to a probation officer recommending disposition, for whom the law accords an absolute quasi-judicial immunity. *Burkes* v. *Callion* (9th Cir. 1970) 433 F.2d 318.

The determinant of both legislative and judicial immunity is whether the act was taken within an objectively defined scope of jurisdiction. Likewise, the criterion for absolute immunity for defamation is whether the protected act took place within the objectively defined course of a judicial proceeding.

The interests supporting judicial immunity apply with equal vigor to prosecutorial immunity and equally demand absolute immunity. The interests supporting absolute immunity in defamation require that acts of counsel in the course of a judicial proceeding be protected.

The term "qualified immunity" has never been satisfactorily defined. However, if it means that the immunity applies only in the absence of malice, the immunity would be a mere defense of good faith, except against the most inartful pleaders who fail to allege malice.

But a good faith defense does not satisfy the interests supporting quasi-judicial immunity. Those interests require protection against the harassment and cost of litigation, the uncertainty of a verdict as to motive, and the inappropriateness of relitigating in the civil forum the impact of a particular act on a criminal trial.

Mr. Pachtman acted not only defensibly, but nobly, in the prosecution of Mr. Imbler. Mr. Pachtman did not close the books on Mr. Imbler after a conviction was obtained and affirmed. Instead, pursuing leads from the Adult Authority, he reinstituted an investigation and transmitted information (Appendix A) harmful to the prosecution's case to the Governor. Petitioner and his counsel, ironically protected by absolute defamation immunity, now (perhaps maliciously) hurl at Mr. Pachtman brickbrat allegations of the knowing use of *"perjured"* testimony, *Brief of Petitioner,* p. 20 (which the California Supreme Court found did not occur, *In re Imbler,* 60 Cal.2d 554; even Judge Ferguson did not find that perjury occurred, see A. 36 and 42). Safely behind their shield of absolute defamation immunity, petitioner and his counsel argue against absolute immunity for prosecutorial acts.

But just as the injury to Mr. Pachtman by defamation in the course of this action is outweighed by the interest in protecting free speech in the course of ju-

dicial proceedings, so the rare injury from prosecutorial misconduct is outweighed by the public interest in protecting the fearless discharge of a prosecutor's duties as advocate of the People and an officer of justice.

For these reasons, the decision of the Ninth Circuit in *Imbler* v. *Pachtman* (1974) 500 F.2d 1301 should be affirmed.

Respectfully submitted,

JOHN H. LARSON,
County Counsel
County of Los Angeles

By JOHN P. FARRELL,
Deputy County Counsel
Attorneys for Respondent Pachtman

APPENDIX

APPENDIX "A"

August 17, 1962

Honorable Edmund J. Brown
Governor, State of California
Capitol Building
Sacramento, California
Attention: Mr. Arthur L. Alarcon, Executive Secretary to the Governor

Dear Sir:

In re Paul Kern Imbler
Adult Authority No. A-48622
S. C. No. 240368

On July 25, 1962, I wrote Mr. C. E. Halderman of the Adult Authority expressing my views pertaining to the above mentioned case. Inasmuch as your office has all of the documents involved, I am writing directly to advise that in my opinion there is now additional evidence that could be important on the issue of the innocence of Mr. Imbler.

This additional evidence relates to two separate portions of the case: the first pertains to an association between Mr. Imbler and a Mr. Lingo and the second to the alibi of Mr. Imbler. This letter will discuss these matters in the order in which they became known.

As the record in this case reflects, evidence of an association between Imbler and Lingo was proven to have existed at the time of an attempted robbery in Pomona, during the course of which Lingo was killed.

This subsequent association on January 14, 1961, was important toward showing an association at the time of the murder on January 4, 1961 [because Lingo was identified as having been a participant in the January 4 murder].

The defense on this point was to the effect that there was no such continuing association as Imbler had only met Lingo immediately prior to the robbery attempt on January 14, 1961. A man described only as "Dale" was supposed to have made the introduction.

Mr. James Biddle, special investigator for the Adult Authority, contacted me on July 30, 1962, and advised that he had contacted a Dale Kemp, who corroborated this defense contention. I felt that in all fairness to Imbler and in the interest of justice this should be completely investigated and accordingly interviewed and took sworn statements from Dale Kemp and Lambert Fontenot. Both statements have been submitted to the Adult Authority and, as a perusal of them will show, they do corroborate Imbler in his contention, as well as the testimony of Jerry Mayes, a participant in the Pomona robbery, as given at the trial. Three statements on different dates were taken from Mayes. In the first he contradicted his trial testimony but in subsequent statements backtracked. At first, he denied knowing Kemp and Fontenot and in particular denied any meeting with them prior to January 14, 1961. In the later statements, he equivocated on this point and what the sum and substance of his statements can be is not clear to me.

Due to the facts that Kemp and Fontenot were ex-convicts, had been at the Chino State Prison with Imbler in the past, and that Imbler didn't name them at the trial, details in their statements were incomplete or did not agree, and part of their statements did not hold up under investigation, I believed them to be of recent manufacture and discounted them. In any event, on August 14 due to finding a corroborating witness of sorts of Imbler's alibi, I re-examined the statements as well as other facts and noted the following: (1) prior to trial [but unknown to the prosecution] Imbler did notify the Public Defender investigator of two men who participated in his introduction to Lingo and stated to the investigator that due to the fact that they were ex-convicts on parole he would rather not reveal their identity unless necessary; (2) the defense attorney himself decided not to present this matter by having this information give to the jury at the trial; (3) at the trial [page 652 of the transcript] Imbler did attempt to give the background of the meeting with Kemp which he claimed led to Kemp's introduction of Lingo to him, but was stopped by an objection and no offer of proof was made by the defense showing the materiality or relevancy. Kemp, Fontenot and Mayes do not tell the true and complete story and there is a strong possibility that what they have told was fabricated prior to the trial. Yet, if this is the case, the question arises as to why, then, wasn't this evidence utilized at the trial. To answer this question, only specula-

tion is possible. In any event, investigation has revealed a consistency in Imbler's position which is now corroborated by others.

The second item of additional evidence relates to Imbler's alibi. He testified he was elsewhere at the time of the murder with "Robert Mahon, Jerry Mayes, and three other men that were friends of Jerry Mayes, one man that he worked with, perhaps the other too" [page 459 of the transcript]. He then testified that he thought the first name of one of these men was George. He further claimed that they made a round of bars in a 1955 Buick belonging to one of the friends of Jerry Mayes. On the other hand, Jerry Mayes, in his testimony, while acknowledging the use of a 1955 Buick, claimed he did not know the names of any of the persons present.

Two men, one named George Koenig and answering the description given by Imbler in his testimony, were found by Mr. Biddle to be working where Mayes had been employed in January of 1961. Their sworn statements are being submitted. George, who was an ex-convict, denies any support of the alibi. Joe Scoffinger, owner of a 1955 Buick in January, 1961, claims he did make the rounds described by Imbler in his testimony, but can't state the date other than as being around the New Year's weekend.

The finding of these witnesses is not conclusive evidence that Imbler is not the murdered. Here again, many possibilties can be speculated. Imbler could have been in the company he claims, but on a different night than that of the murder, and he could be hoping that the inconclusiveness of witnesses as to the date they were in his presence would work to his benefit. It is also possible that Joseph Scoffinger is a manufactured witness. On the other hand, there is again consistency by Imbler, and it seems that Scoffinger could have been located by the defense, and his testimony to the jury could have been taken for whatever its worth.

A third factor in this case that should in all fairness be called to your attention is the recently determined background of the People's principal witness, Mr. Alfred Costello. It has just been discovered that Mr. Costello is not a professional man, nor does he have a college degree. He has several convictions involving checks and presently is in the County Jail awaiting trial on another such charge. He has a history of ingratiating himself with the various law enforcement agencies and provides them with information. He manages to turn this situation to his advantage when he gets into difficulty. Needless to say, these matters were not known to me at the time of the trial, nor do I know what effect it would have had if it had been known. Mr. Costello did appear honest and forthright in his testimony and successfully stood up under rigorous cross examination.

I want to make clear that this office presented all the facts we had available to the jury, the defendant had a fair trial, and the verdict of the jury was certainly consistent with the evidence. I am not at all

convinced that the defendant is innocent of this charge, but I do believe, as does the District Attorney's Office, that a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented. To fail in this duty would result in a miscarriage of justice and weaken our judicial system. In fulfilling my duty, I am conveying this information to you. If I can be of any further assistance in this case, please notify me.

Very truly yours,

WILLIAM B. McKESSON
District Attorney

By
RICHARD E. PACHTMAN
Deputy District Attorney

REP: pln

[Note: brackets in original]

APPENDIX "B"

I. CIRCUITS HOLDING PROSECUTOR ABSOLUTELY IMMUNE FOR DAMAGES UNDER THE CIVIL RIGHTS ACT FOR ACTIONS WITHIN SCOPE OF PROSECUTORIAL FUNCTION

CIRCUIT	LEADING CASES	COMMENT
1st	Guerro v. Mulhearn (1974)[a] 498 F.2d 1249	[a]But obtaining search warrant or wiretap order not deemed within prosecutorial function.
2nd	Dacey v. New York County Lawyers Ass'n.[b] (1969) 423 F.2d 188, cert. den. 90 S.Ct. 1819, Fanale v. Sheehy (1967) 385 F.2d 866	[b]But suppression of book by Bar Ass'n. as unlawful practice of law not included within absolute immunity.
3rd	Kauffman v. Moss (1970) 420 F.2d 1270; Bauers v. Heisel (1966) 361 F.2d 581, cert. den. 386 U.S. 1021, approved in Johnson v. Alldredge (1973) 488 F.2d 820, 827, cert. den. ____ U.S. ____.	

5th	Guerrero v. Barlow (1974) 494 F.2d 1190; Brazzel v. Adams (1974) 493 F.2d 489	
7th	Tyler v. Witkowski (1975) 511 F.2d 449; Holton v. Boman (1974) 493 F.2d 1176;[e] John v. Hurt (1973) 489 F.2d 786;[f] Hampton v. City of Chicago (1973) 484 F.2d 602, cert. den. 415 U.S. 917; Berg v. Cwiklinski (1969) 416 F.2d 929; Arensman v. Brown (1970) 430 F.2d 190	[e]*Holton* though fuzzily written holds no more than that a prosecutor is not immune for acts outside his prosecutorial function. [f]*John* speaks of an undefined "qualified immunity" for prosecutors citing cases which qualify the immunity to the scope of the prosecutorial function.
8th	Duba v. McIntyre (1974) 501 F.2d 590 U.S. App. Pend., Barnes v. Dorsey (1973) 480 F.2d 1057, Wilhelm v. Turner (1970) 431 F.2d 177	
9th	Imbler v. Pachtman (1974) 500 F.2d 1301, Robichaud v. Ronan (1965) 351 F.2d 533	

II. CIRCUITS HOLDING A PROSECUTOR IS LIABLE FOR DAMAGES UNDER THE CIVIL RIGHTS ACT FOR ACTIONS WITHIN PROSECUTORIAL FUNCTION IF MALICIOUS

CIRCUIT	LEADING CASES	COMMENT
6th	Hilliard v. Williams (1972) 465 F.2d 1212, cert. den. 409 U.S. 1029	

III. CIRCUITS WHERE IMMUNITY FOR ALLEGEDLY MALICIOUS ACTS IS IN SOME DOUBT

CIRCUIT	LEADING CASES	COMMENT
4th	Weathers v. Ebert (1974)[c] 505 F.2d 514, U.S. App. Pend., McCray v. State of Maryland (1972)[d] 456 F.2d 1.	[c]The *Hilliard* case was noted and the question of absolute immunity for intentional misuse of prosecutorial power was reserved; but held that prosecutor was absolutely immune for negligent or reckless behavior.
10th	Valdez v. Black (1971)[e] 446 F.2d 1071	[d]This earlier case reaffirmed the rule that prosecutors are absolutely immune for acts within the prosecutorial function. [e]Valdez upheld a defense verdict rendered despite jury instructions based on a qualified immunity; the Court of Appeals therefore did not have to decide whether a qualified or absolute immunity applied.
	Kostal v. Stoner (1961)[f] 292 F.2d 492	[f]Kostal contemplates an absolute immunity.

APPENDIX "C"

INSTRUCTION NO. 36

The fact that a witness has suffered mental disease or mental derangement of the type termed insanity, if such be a fact, may be considered by you in judging whether that condition affected the witness's power of perception or observation at the time of which he testified or whether that condition affected his ability to recollect or remember the facts to which he testified or his ability to narrate those facts while testifying in this trial.

The fact of such insanity does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

People v. LaRue, 62 C.A. 76
People v. Bell. 138 C.A. 2d 7
Witmore on Evidence, 3rd Edition, Section 932

APPENDIX "D"

INSTRUCTION NO. 35

CONVICTION OF A FELONY

The fact that a witness had been convicted of a felony, may be considered by you [for only one purpose, namely,] in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness.

APPENDIX "E"

LOS ANGELES COUNTY CHARTER AND ORDINANCE PROVISIONS CITED

1. LOS ANGELES COUNTY CHARTER

Article IV, Section 12

The elective County officers other than members of the Board of Supervisors shall be: Sheriff, District Attorney and Assessor.

Article VI, Section 21

The County Counsel shall represent and advise the Board of Supervisors and all County, township and school district officers, in all matters and questions of law pertaining to their duties, and shall have exclusive charge and control of all civil actions and proceedings in which the County, or any officer thereof, is concerned or is a party. He shall also act as attorney for the Public Administrator in the matter of all estates in which such office is executor, administrator with the will annexed, or administrator, and the County Counsel shall, in every such matter, collect the attorney's fees allowed therein by law and pay the same into the County Treasury.

Article IX, Section 34 (13)

The Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law, shall keep min-

utes of its proceedings and records of its examinations and shall, as a Board or through a single Commissioner, make investigations concerning the enforcement and effect of this Article and of the rules and efficiency of the service. It shall make an annual report to the Board of Supervisors.

The rules shall provide:

. . .

(13) For the discharge or reduction in rank or compensation after appointment or promotion is complete, by delivering to the person discharged or reduced a notice of such discharge or reduction stating the effective date thereof and the reasons for such discharge or reduction. Such reasons shall state the specific grounds and the particular facts upon which the discharge or reduction is based, and the discharged or reduced employee shall be allowed a reasonable time in which to reply thereto in writing. Both the reasons and the reply must be filed with the Commission, whereupon if the discharged or reduced employee shall so request, the Commission shall set a hearing. Such a hearing may be before one or more members of the Commission or a hearing board or officer appointed by the Commission. If such hearing is not before the full Commission, findings shall be submitted to the Commission for its approval. If the Commission accepts such findings it need not read the record of the hearing; if it declines to accept such findings,

it must read the record or hold a hearing *de novo*. If the Commission concludes that the reasons are not sufficient to justify such discharge or reduction, it shall so notify the appointing authority concerned and the discharged or reduced employee automatically shall be reinstated retroactively to his position as of a date specified by the Commission pursuant to its rules. If the Commission finds that the discharge or reduced employee was without fault or delinquency, he shall be reinstated as of the date of his discharge or reduction.

Article XI, Section 50 [in part, excluding procedures for recall]

"The holder of any elective or appointive county or township office may be recalled by the electors at any time after he has held his office six months. . . ."

2. LOS ANGELES COUNTY ADMINISTRATIVE CODE

(Ordinance No. 4099)

Section 171.

"It shall be the duty of the District Attorney to cooperate with the Superior, Municipal and other courts in the County of Los Angeles, and the County Counsel and all other officers concerned with the acceptance, approval, release and forfeiture of bail bonds. He shall, so far as consistent with law, assist in the enforcement of any

rules adopted by the Superior or Municipal Courts in this County, with respect to bail, and perform any duties delegated to him thereby.

"He shall keep a calendar which shall show the names of all defendants released on bail, the date of such release, by whom ordered, and when and where the defendant is required to appear, the name and addresses of the sureties and the amount of the bail. The calendar shall also show the date of any order of forfeiture or exoneration of any bail, by whom ordered, the date of notification to the County Counsel of any fortfeiture, and any other matter or thing which may be necessary to show a complete record of all actions taken with regard to bail.

"It shall be the duty of the District Attorney to notify the County Counsel of any forfeiture of bail, and to furnish the County Counsel with a complete record of all facts necessary to enable the County Counsel to maintain an action on any forfeited bail bond, including certified copies of minute entries and court dockets, and if the bail forfeited be cash or its equivalent, the District Attorney shall notify the officer having custody of such cash or its equivalent of the fact and date of forfeiture and by whom made. The County Auditor shall be given the same notification at the same time as the County Counsel or other officer.

"The District Attorney shall also notify the sureties on any forfeited bond of the fact of forfeiture by mail directed to the address given by the surety."

Section 751

"The Commission on Judicial Procedures is hereby continued. All references in this article to the "Commission" shall be deemed a reference to the Commission on Judicial Procedure. The Commission shall consist of:

(a) The following ex officio members:

(1) The Presiding Judge of the Superior Court of the County.

(2) The Presiding Judge of the Municipal Court of the Los Angeles Judicial District.

(3) The President of the Los Angeles County Municipal Judges Association.

(4) The District Attorney.

(5) The Public Defender.

(b) Ten members appointed by the Board."

Section 1034

"The District Attorney, Sheriff, and County Counsel each shall appoint one representative from his department to attend and participate in the meetings of the [Narcotics and Dangerous Drugs] Commission without a vote."

Section 1170

"The Board hereby directs and requests the Department of Community Services, County Counsel, District Attorney, Probation Officer, and the Sheriff, and all other County officers to aid and

cooperate in every way with the [Delinquency and Crime] Commission."

Section 1616 (a)

"The Sheriff, the District Attorney, the officers and employees listed in Section 1614, and all other county officers and employees whose qualifications enable them to do so shall coordinate with the Director [of Human Services] on the development and implementation of plans for county-wide programs to reduce delinquency and recidivism and for other county-wide programs of human services for juveniles and adults."